No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VILLAGE OF WILLOWBROOK, an Illinois municipal corporation, GARY PRETZER, individually and as President of the VILLAGE OF WILLOWBROOK, and PHILIP J. MODAFF, individually and as Director of Public Services of the VILLAGE OF WILLOWBROOK,

Petitioners,

v.

GRACE OLECH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES L. DEANO
Counsel of Record
NORTON, MANCINI, ARGENTATI, WEILER & DeANO
109 North Hale Street
P.O. Box 846
Wheaton, Illinois 60189-0846
(630) 668-9440

Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

42pp

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated.

B. Whether the government conduct alleged in Respondent's First Amended Complaint meets the standard to state a cause of action on behalf of a "class of one," assuming the Equal Protection Clause protects such individuals.

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings before the Seventh Circuit Court of Appeals appear in the caption of the case.

TABLE OF CONTENTS

INDEX TO APPENDIX APP. PAGE

TABLE OF AUTHORITIES

Cases PAGE(S)

Constitutional Provision Involved

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Village of Willowbrook, an Illinois Municipal corporation, Gary Pretzer, individually and as President of the Village of Willowbrook, and Philip J. Modaff, individually and as Director of Public Services of the Village of Willowbrook, respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 160 F.3d 386 and is reprinted at pages App. 1 to 6 of the Petitioners' Appendix. The opinion of the District Court for the Northern District of Illinois, Eastern Division, Civil No. 97 C 4935, dated April 13, 1998, is not published, but can be found at 1998 WL 196455 (N.D.Ill.) and is reprinted at pages App. 7 to 14 of the Petitioners' Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on November 12, 1998. No Petition for Rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Equal Protection Clause provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

I. Nature of the Case

This is an equal protection action brought by Respondent to recover for damages sustained as a result of a three-month delay in a project that connected Petitioner Village of Willowbrook's municipal water supply to her home. The Respondent has alleged that the delay occurred because Petitioners initially demanded, as a condition of extending water service, that Respondent grant to the Village a thirty-three-foot easement to improve the road along which the new water main would be installed and that the delay was maliciously caused by the Petitioners in retaliation for Respondent's filing of a separate lawsuit against the Village.

The Respondent brought the cause of action pursuant to principles set forth by the Seventh Circuit Court of

Appeals in the case of *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), alleging that Petitioners violated the Equal Protection Clause by singling her out as the object of their animosity. In *Esmail*, the plaintiff was denied a liquor license ostensibly based on minor infractions while others were granted licenses despite more severe infractions. The Seventh Circuit Court of Appeals held that the Equal Protection Clause provided a remedy despite the plaintiff's lack of membership in a vulnerable group, because "a powerful public official picked on a person out of sheer vindictiveness." 53 F.3d at 178. The court deemed the Equal Protection Clause applicable where a plaintiff could prove that "action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." 53 F.3d at 180.

II. Statement of Facts

The following facts are taken from the allegations of Respondent's First Amended Complaint. In the spring of 1995, the Petitioner Village of Willowbrook developed a plan to require all homeowners along Tennessee Avenue to be connected to the municipal water supply system and the plan was to be implemented by the spring of 1997. The Respondent resided in the Village of Willowbrook along Tennessee Avenue which was a non-dedicated road. In the spring of 1995, Respondent's well broke down and in May of 1995 Respondent requested that the Village connect her home to the municipal water system "right away." As part of the water extension project, the Village desired to dedicate Tennessee Avenue and improve it with pavement, side-

walks and public utilities. To fully improve the road, the Village requested from the Respondent in August and September, 1995, a thirty-three-foot easement on land owned by Respondent abutting Tennessee Avenue. The Respondent objected to providing a thirty-three-foot easement and in November of 1995, the Village agreed to require a fifteen-foot easement and a temporary construction easement of an additional five feet for the water extension project. The project was completed and water was delivered to Respondent's home in March of 1996.

The Respondent's Amended Complaint does not allege that any other Village residents who lived adjacent to non-dedicated unimproved roads were not asked for thirty-three-foot easements to improve the roads as a condition of the delivery of public water. Nor does the Amended Complaint allege that Tennessee Avenue was ultimately dedicated or improved as part of the water connection project. The Complaint alleged that Petitioners violated Respondent's equal protection rights by initially demanding the thirty-three-foot easement, a demand not made of others similarly situated. It was further alleged that ill will generated by a separate lawsuit filed by Respondent against the Village motivated Petitioners to treat Respondent differently.

III. Course of Proceedings and Disposition Below

Respondent's original Complaint was withdrawn and Petitioners' Motion to Dismiss the First Amended Complaint was granted on April 13, 1998. Respondent filed a timely Notice of Appeal on May 13, 1998, and on November 12, 1998, the Seventh Circuit Court of Appeals issued its opinion reversing the District Court and remanding the case to the District Court for further proceedings.

The Court of Appeals held that Respondent's allegations that Petitioners' demand for a thirty-three-foot easement when, according to Respondent, similarly-situated property owners had given fifteen-foot easements, and that Petitioners did so to retaliate against the Respondent for filing a prior lawsuit against the Village were sufficient to state a cause of action for denial of equal protection. The court clarified its earlier decision in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), by stating that a government can violate the Equal Protection Clause if it acts out of ill will, even though its conduct may not constitute an orchestrated campaign of harassment directed against the Respondent and despite Respondent's lack of membership in a "class."

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH AN OPINION EMANATING FROM THE SIXTH CIRCUIT COURT OF APPEALS INSOFAR AS IT RECOGNIZES AN EQUAL PROTECTION CLAIM BROUGHT ON BEHALF OF A "CLASS OF ONE."

In its opinion below, the Seventh Circuit Court of Appeals applied the equal protection-based "class of one" claim first recognized by the Seventh Circuit Court of Appeals in *Esmail v. Macrane,* 53 F.3d 176 (7th Cir. 1995). In *Esmail,* the plaintiff, owner of a liquor store,

claimed a violation of his equal protection rights through a campaign of harassment by the defendant, Mayor of the City of Naperville. The plaintiff alleged that the defendant repeatedly attempted to deny him a liquor license and caused the police to harass him at every opportunity. This "campaign of vengeance" was in retaliation for plaintiff's past success in having a liquor license revocation reduced to a brief suspension by the state liquor control commission, the plaintiff's advertising campaign against the sale of liquor to minors, and the plaintiff's prior withdrawal of political and financial support from the mayor. The plaintiff claimed that other liquor license applicants similarly situated received licenses while he, the victim of an orchestrated campaign of official harassment motivated by the mayor's ill will, was denied a license. The court concluded that the plaintiff had stated a Fourteenth Amendment equal protection claim, despite the lack of any allegation that he was victimized because of his membership in a suspect class. Rejecting defendant's contention that the Equal Protection Clause did not favor a "class of one," the court stated:

> Neither in terms nor interpretation is the [Equal Protection] Clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives . . . 53 F.3d at 180.

The Sixth Circuit Court of Appeals and a district court in the Fourth Circuit have rejected the *Esmail* doctrine. *Futernick v. Sumpter Township,* 78 F.3d 1051 (6th Cir. 1996); *Edwards v. City of Goldsboro,* 981 F.Supp. 406, 410 (E.D.N.C. 1997); and *Dubuc v. Green Oak Township,* 958 F.Supp. 1231, 1236-37 (E.D. Mich. 1997).

In *Futernick,* the plaintiff sued an official from the Michigan Department of Public Health alleging an equal protection violation. Plaintiff contended that defendant required that only he, and not others similarly situated, incur more than $700,000 in costs to modify sewage treatment facilities on his commercial property. The district court granted defendant's 12(b)(6) Motion to Dismiss and the Sixth Circuit Court of Appeals affirmed, characterizing plaintiff's action as a selective enforcement equal protection claim. The court affirmed the dismissal of the complaint, noting that plaintiff did not claim to be a member of a vulnerable group. Refusing to expand equal protection claims to cover single-member classes, the court observed:

> The nature of the right to equal protection also counsels against expanding a federal right to protection from non-group animosity on the part of local officials. It is clearly not a violation of equal protection if a local regulator, faced with limited resources, picks people to regulate in a perfectly random manner. *Supra n.8.* Similarly, the presence of personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution. From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as *random* as the role of a dice. There is no constitutionally significant category of people that have a greater or lesser chance of being affected by it. The Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally

suspicious. (Emphasis in original.) 78 F.3d 1051 at 1059.

The court cautioned that expansion of the Equal Protection Clause to single-member classes would result in a flood of litigation:

> The sheer number of possible cases is discouraging. Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited. 78 F.3d 1051 at 1058.

Finally, the court reasoned that victims of discriminatory practices of local regulators had recourse in state courts and political processes. 78 F.3d at 1058.

In *Edwards,* the plaintiff, a police officer, brought an equal protection claim against his employer, arguing that he was arbitrarily denied an opportunity for secondary employment. Dismissing plaintiff's complaint, the district court observed that plaintiff could not allege that he was selectively treated based on membership in a vulnerable group. The court rejected *Esmail*'s class-of-one doctrine because it was "far-removed from the motives behind the Equal Protection Clause of the Fourteenth Amendment . . ." 981 F.Supp. 406 at 410. The court cited this Court's opinion in *Palmer v. Thompson,* 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), for the proposition that the Equal Protection Clause was intended to safeguard classes, such as minorities, against discriminatory action by the state,

and not individuals who are not members of a suspect class.

In *Dubuc,* the plaintiff brought a Fourteenth Amendment claim arguing that the township zoning board and related officials treated him differently than other township residents, in effect treating him as an arbitrary "class of one," by strictly enforcing ordinances against him that impeded his efforts to develop commercial property. The plaintiff argued that defendants, motivated by ill will, pursued a policy of denial of governmental services to him alone. The plaintiff did not claim that defendants' treatment of him interfered with his exercise of a constitutional right, but rather that defendants singled him out for disparate treatment because of a past lawsuit he filed against the state. The district court cited *Futernick* in rejecting the application of the *Esmail* doctrine. The court held that equal protection prohibits selective enforcement only against arbitrary classifications of groups, not against any particular individual.

Even the Seventh Circuit Court of Appeals has, as recently as 1995, reiterated the long-held notion that the Equal Protection Clause was not intended to protect individuals who do not claim membership in a protected class. *Herro v. City of Milwaukee,* 44 F.3d 550 (7th Cir. 1995). In *Herro,* the Seventh Circuit rejected the "class of one" equal protection claim brought by an unsuccessful applicant for a tavern license. Plaintiff brought suit alleging that defendants had been motivated by personal animus to treat him unlike other applicants had been treated. The Court of Appeals affirmed summary judgment for the defendants holding that a person

bringing an equal protection claim must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual. 44 F.3d at 552. To the suggestion that the Equal Protection Clause extended to protect a "class of one," the court responded:

> It is true that older cases from this Circuit suggest a broader reach to the Equal Protection Clause. See, *e.g. Falls v. Town of Dyer,* 875 F.2d 146 (7th Cir. 1989) (holding that a class of only one member can still complain of discrimination against his tiny class if he can show that a combination of legislative and executive action has singled him out for unique treatment.) Yet we think that the more recent cases, particularly *Albright*, place additional burdens on plaintiffs to identify the classification behind even a 'class of one.' 44 F.3d at 553.

Cited by the *Herro* court was a 1990 decision issued by the Seventh Circuit Court of Appeals in *New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474 (7th Cir. 1990). In *New Burnham,* the plaintiff sought building permits from the defendant for the construction of a multiple-family and single-family development. Plaintiff's permits were delayed, he alleged, because defendants feared that blacks would reside in the development. Plaintiff also alleged that defendants demanded that he pay a disproportionate share of the cost of a retention pond intended to serve his and other developments. Plaintiff claimed that another developer, a former village attorney, was treated more favorably with respect to the cost of the retention pond and the number of documents to be submitted in support of the permit request. Plaintiff

sued defendants, claiming, among other things, a denial of equal protection because he had been treated differently than similarly-situated developers.

In affirming summary judgment on the equal protection claim, the Seventh Circuit Court of Appeals noted that the fundamental flaw in the claim was plaintiff's lack of membership in a vulnerable group. Citing this Court's decision in *Personnel Administrator v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), the court observed:

> In order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group. Discrimination based merely on *individual,* rather than group, reasons will not suffice. 910 F.2d at 1481. (Emphasis in original.)

See also, *Smith v. Town of Eaton, Ind.,* 910 F.2d 1469, 1472 (1990) (equal protection claim must be based on intentional discrimination against the plaintiff because of his membership in a particular class, not merely because he was treated unfairly as an individual).

The central purpose of the Equal Protection Clause "is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). The Fourteenth Amendment forbids such conduct on the principle that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

The ultimate goal of the Equal Protection Clause has been "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 1881-82, 80 L.Ed.2d 421 (1984). Therefore, "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Adarand Constructors v. Pena,* 515 U.S. 200, 230, 115 S.Ct. 2097, 2114, 132 L.Ed.2d 158 (1995).

It is true that in enforcing the Equal Protection Clause of the Fourteenth Amendment, this Court has broadened the protections conferred beyond prohibiting racial discrimination. It has been held to prohibit unjustified discrimination on the basis of gender, *United States v. Virginia,* 518 U.S. 515, 534 (1996); alienage, *Truax v. Raich,* 239 U.S. 33, 39, 36 S.Ct. 7, 60 L.Ed. 131 (1915); parentage, *Galona v. American Guarantee and Liability Insurance Company,* 391 U.S. 73, 76, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); criminal conviction, *Rinaldi v. Yeager,* 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 1577 (1966); and type of business, *Atchison, Topeka & Santa Fe Railway v. Fosburg,* 238 U.S. 56, 62, 35 S.Ct. 675, 59 L.Ed. 1199 (1915). Though the Equal Protection Clause is no longer limited to protecting against racial discrimination, its ultimate objective is still clear; the protection of vulnerable groups.

While judicial interpretations of the concept of equal protection have been far from uniform, they generally have focused on whether the plaintiff was a member of a victimized class. *See, Albright v. Oliver,* 975 F.2d 343,

348 (7th Cir. 1992), aff'd on other grounds, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Expansion of the Equal Protection Clause to single plaintiffs would trivialize it by potentially elevating every indignity suffered by any individual to an equal protection claim. In *Booher v. United States Postal Service,* 843 F.2d 943, 944 (6th Cir. 1988), it was noted that the equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class. For this reason, the Sixth Circuit held in *Joyce v. Mavromatis,* 783 F.2d 56, 57 (6th Cir. 1986), that the plaintiff failed to state a claim under the Equal Protection Clause because he was not a member of a class or group singled out for discriminatory treatment.

It is submitted by Petitioners that this Honorable Court should review this case to define the scope of the Equal Protection Clause of the Fourteenth Amendment. Each day public officials exercise their discretion in making decisions concerning the provision of public services. The lack of harmony between the *Esmail* doctrine and the decisions cited herein leave public officials and citizens uncertain as to their rights and remedies when making or challenging these decisions. Review by this Court is essential to clarify this issue and facilitate a uniform application of the Equal Protection Clause thereby minimizing litigation which, currently, leads to varying interpretations and inconsistent results.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW AUTHORIZES AN UNWARRANTED EXPANSION OF A VERY NARROW CAUSE OF ACTION FOR EQUAL PROTECTION ON BEHALF OF A "CLASS OF ONE."

In the event that this Court finds the *Esmail* doctrine to be a valid interpretation of the Equal Protection Clause, the Petitioners submit that the opinion below represents an unwarranted expansion of the narrow cause of action set forth in *Esmail*. In *Esmail*, the court reasoned that the cause of action recognized therein stemmed from the Equal Protection Clause's "last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives." 53 F.3d at 180. The cause of action was rooted, the court held, in governmental conduct that was malicious, unrelenting, motivated by "malignant animosity," and "wholly unrelated to a legitimate public objective." 53 F.3d at 179-80. The standard for governmental conduct established by *Esmail* required proof of an orchestrated campaign of official harassment aimed at doing significant injury to a harmless plaintiff. Plaintiff's burden, according to *Esmail*, was to prove that the defendants' actions reflected a spiteful effort to "get him" for reasons wholly unrelated to any legitimate state objective.

The necessary components of the cause of action can be gleaned from the following statements in *Esmail*:

> In particular, Esmail is not complaining merely that equally or more guilty liquor licensees than he are treated more leniently. He is complaining about an *orchestrated campaign of official harassment* directed against him out of sheer malice. 53 F.3d 176 at 179. (Emphasis added.)

* * *

> What it (the Equal Protection Clause) does require, and what Esmail may or may not be able to prove, is that the action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons *wholly unrelated to any legitimate state objective*. 53 F.3d at 180. (Emphasis added.)

* * *

> If the power of government is brought to bear on a *harmless individual* merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court. 53 F.3d at 179. (Emphasis added.)

Thus, the cause of action requires (1) an orchestrated campaign of official harassment (2) directed at a "harmless" individual and (3) wholly unrelated to any legitimate state objective.

A. Respondent's Allegations Do Not Demonstrate an Orchestrated Campaign of Official Harassment.

In *Esmail*, the "orchestrated campaign of official harassment directed against [plaintiff] out of sheer malice" was characterized as a "campaign of vengeance." This campaign included attempts to deny the plaintiff his liquor license as well as efforts to harass plaintiff and his employees with constant intrusive surveillance, repeated police stops during which the plaintiff was forced to undergo field sobriety tests and in the filing of false criminal charges against plaintiff. 53 F.3d at 178.

In this case, however, rather than demonstrating that Petitioners attempted to "get" the Respondent, the Amended Complaint reveals that Petitioners initially, and for a short time, sought an easement of sufficient width to improve a roadway with pavement, sidewalks and public utilities. Such improvements would benefit residents, including the Respondent, much more than they would benefit the government. Respondent, apparently not desirous of such improvements, objected to the thirty-three-foot easement, but ultimately agreed to a fifteen-foot easement, and another five-foot temporary construction easement. Petitioners' conduct in this regard was hardly an orchestrated campaign of harassment, or an effort to "get" the Respondent, but merely a legitimate effort to improve a road obviously used by the Respondent with great frequency. *Esmail* is distinguishable in that the defendant there had no such public improvement or purpose in mind when attempting to deprive the plaintiff of his business license.

The Village's lack of malice and intent to harass is evidenced by the fact that it abandoned its initial request within three months and agreed to a permanent easement of fifteen feet and a temporary easement of five feet and completed the water extension project within nine months of Respondent's request and a full year before the project was intended to be completed. The initial thirty-three-foot easement request was part of a legitimate attempt to improve Tennessee Avenue and therefore cannot amount to a denial of equal protection. In *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis,* 101 F.3d 1179 (7th Cir. 1996), the court reasoned that even though a class can consist of a single member, the

plaintiff must still demonstrate the defendant's conduct to be irrational and arbitrary.

At worst, Respondent's allegations show that the Respondent was a random victim of governmental error; the Village initially asked the Respondent for a thirty-three-foot easement, but later obtained advice from counsel that a total of twenty feet of easement would suffice. A claim for violation of equal protection will not lie where the governmental action was taken out of error, neglect or mistake. *Ciechon v. City of Chicago,* 686 F.2d 511, 523 (7th Cir. 1982). To give rise to a constitutional grievance, the government conduct must be rooted in design and not derived merely from error or fallible judgment. *Hamlyn v. Rock Island County Metropolitan Mass Transit District,* 986 F.Supp. 1126, 1133 (C.D.Ill. 1997).

B. Petitioners' Actions Were Related to a Legitimate State Objective.

The *Esmail* court explained that the Equal Protection Clause does not require government to treat all identically-situated individuals identically, but prohibits unequal treatment which is solely the result of vindictiveness. Thus, unequal treatment does not necessarily violate the Equal Protection Clause, except when the distinctive treatment has no rational relation to a legitimate government interest. *Indiana State Teachers Association v. Board of School Commissioners of the City of Indianapolis*, 101 F.3d 1179, 1182 (7th Cir. 1996) (unequal treatment of similar persons does not offend the Equal Protection Clause where a rational basis for the government action exists).

Respondent claims that the Petitioners created a class of one by singling her out for disparate treatment. Where the government is alleged to have made such a "classification," it is entitled to a presumption that its classification is rational and constitutional. *Wroblewski v. City of Washburn,* 965 F.2d 452, 459 (7th Cir. 1992). To overcome this presumption of rationality, the Respondent must establish in his complaint that the facts which formed the basis of the classification could not reasonably be conceived to be true by the governmental decision-maker. *Wroblewski v. City of Washburn,* 965 F.2d 452, 459 (7th Cir. 1992). Where a rational basis for the government conduct emerges from the allegations of the complaint, the complaint cannot survive a motion to dismiss. *Wroblewski v. City of Washburn,* 965 F.2d 452, 460 (7th Cir. 1992).

Here, the allegations of Respondent's Amended Complaint reveal there to be a rational basis for Petitioners' conduct. The desire to extend and improve the infrastructure of the road in conjunction with the installation of the water delivery system was certainly a legitimate government objective. In *Esmail,* the sole objective was to deprive the plaintiff of his license. Here, it is clear that it was not the government's sole objective to deprive Respondent of water. The Respondent did receive the water, albeit not "right away." The delay in completing the water delivery system was attributable to legitimate government efforts to improve the road with pavement, sidewalks and public utilities in conjunction with the water extension project.

Though Respondent attempts to draw the inference that her alleged unequal treatment was due to her

status as a claimant against the Village in another lawsuit, that conclusion does not logically follow from the allegations of the Amended Complaint. The Amended Complaint pleads a rational basis for Petitioners' conduct; the desire to improve a street used by the Respondent in conjunction with the installation of a water main under that street. *Esmail* recognized that the state's act of singling out an individual for differential treatment does not itself give rise to the cause of action. It is the malicious and spiteful motivation that forms the basis of the cause of action. Even if such improper motivation is alleged, the cause of action does not survive a motion to dismiss where, as here, a legitimate motivation for the governmental action exists.

It is submitted by Petitioners that the decision issued by the Court of Appeals in this case will trigger innumerable lawsuits against municipalities and public officials brought by citizens claiming they were treated differently by a governmental entity motivated by ill will. The opinion below does not require the Respondent to plead and prove that the government's primary objective was to harm a citizen or that the government's actions were not related to a legitimate objective. Nor does the opinion below require the "orchestrated campaign of official harassment" originally required by *Esmail.* The ruling by the Court of Appeals can be interpreted to allow any citizen claiming to suffer even trivial indignities to avail himself of the protection of the Fourteenth Amendment.

CONCLUSION

Wherefore, Petitioners respectfully request that this Honorable Court grant this Petition for a Writ of Certiorari and review and reverse the decisions of the Seventh Circuit Court of Appeals.

Respectfully submitted,

JAMES L. DEANO
Counsel of Record
NORTON, MANCINI, ARGENTATI,
WEILER & DeANO
109 North Hale Street
P.O. Box 846
Wheaton, Illinois 60189-0846
(630) 668-9440

Attorneys for Petitioners

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2235

GRACE OLECH,

Plaintiff-Appellant,

v.

VILLAGE OF WILLOWBROOK, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 4935—**George M. Marovich**, *Judge.*

ARGUED OCTOBER 8, 1998—DECIDED NOVEMBER 12, 1998

Before POSNER, *Chief Judge*, and CUMMINGS and ESCHBACH, *Circuit Judges.*

POSNER, *Chief Judge.* In *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), we held that the equal protection clause provides a remedy when "a powerful public official picked on a person out of sheer vindictiveness." *Id.* at 178. Although the clause is more commonly invoked on behalf of a person who either belongs to a vulnerable minority or is harmed by an irrational difference in treatment, it can also be invoked, we held, by a person who can prove that "action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate

state objective." *Id.* at 180. See also *Indiana State Teachers Ass'n v. Board of School Commissioners*, 101 F.3d 1179, 1181-82 (7th Cir. 1996); *Ciechon v. City of Chicago*, 686 F.2d 511, 522-24 (7th Cir. 1982); *Batra v. Board of Regents*, 79 F.3d 717, 721-22 (8th Cir. 1996); *Yerardi's Moody Street Restaurant & Lounge, Inc. v. Board of Selectmen*, 932 F.2d 89, 94 (1st Cir. 1991); *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980). Grace Olech brought suit against the Village of Willowbrook and two of its high officials in reliance on *Esmail*'s principle and was tossed out on the defendants' Rule 12(b)(6) motion on the ground that the facts pleaded in her complaint did not fit the mold of *Esmail*.

Olech and her husband, now deceased, used to get their water from a well on their property. But the well broke down and they asked the Village of Willowbrook, where their property is located, to connect their home to the municipal water system. The Village agreed, but besides requiring the Olechs to pay the cost of the hook up (which apparently is a standard requirement and one with which they complied without complaining) told them they would have to grant the Village not the customary 15-foot easement to enable servicing of the water main but a 33-foot easement to permit the Village to widen the road on which they live. The Olechs refused, and after three months the Village relented, acceded to the smaller easement, and hooked up the water. But meanwhile the Olechs had been without water and as a consequence suffered various types of damage for which they seek redress in this suit.

So far in our recitation of the allegations of the complaint there is nothing to suggest a denial of equal protection. But the complaint goes on to allege that the defendants' motivation for insisting on the nonstandard easement was the fact that the Olechs earlier had sued the Village, and obtained damages, for flood damage caused by the Village's negligent installation and enlarge-

ment of culverts located near the Olechs' property. See *Zimmer v. Village of Willowbrook*, 610 N.E.2d 709, 712 (Ill. App. 1993). The complaint alleges that the lawsuit generated "substantial ill will" that caused the Village to depart from its normal policy of demanding only a 15-foot easement in exchange for providing municipal water and instead to decide to pave over a chunk of the Olechs' property. A letter is cited in which the Village's lawyer conceded, after the Village had backed down and agreed to require only the 15-foot easement, that that easement "will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village." For three months the Olechs had been treated differently, to their detriment, from all other property owners in the Village only because their meritorious suit against the Village had angered Village officials. These are just allegations and may be false. But as the defendants acknowledge, we must assume they are true for purposes of this appeal. The defendants have yet to file an answer or any other pleading that denies any allegation of the complaint.

Nevertheless the district judge granted the defendants' motion to dismiss because the complaint didn't allege an "orchestrated campaign of official harassment" motivated by "sheer malice," quoting our opinion in *Esmail*. 53 F.3d at 179. Nothing in the *Esmail* opinion, however, suggests a *general* requirement of "orchestration" in vindictive-action equal protection cases, let alone a legally significant distinction between "sheer malice" and "substantial ill will," if, as alleged here, the ill will is the sole cause for the action of which the plaintiff complains. Esmail was complaining that he had been denied liquor licenses on the basis of trivial infractions for which no other applicant had ever been denied a license. Standing by itself, this difference in treatment would not have been a denial of equal protection, but merely an example of uneven law

enforcement, than which nothing is more common nor, in the usual case, constitutionally innocent. E.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Esmail v. Macrane, supra*, 53 F.3d at 179; *Falls v. Town of Dyer*, 875 F.2d 146, 148-49 (7th Cir. 1989); *Hameetman v. City of Chicago*, 776 F.2d 636, 641 (7th Cir. 1985). The plaintiff had to and did allege that the denial of his applications was the result not of prosecutorial discretion honestly (even if ineptly—even if arbitrarily) exercised but of an illegitimate desire to "get" him because of lawful actions by him that had aroused the mayor's ire. It was in that context that we pointed out that the complaint alleged much more than uneven enforcement.

The present case is not one of uneven enforcement. The Village does not deny that it has a legal obligation to provide water to all its residents. If it refuses to perform this obligation for one of the residents, for no reason other than a baseless hatred, then it denies that resident the equal protection of the laws. And that is sufficiently alleged. While it may have been important in *Esmail* that the plaintiff alleged an "orchestrated campaign," it was not important here. The district judge did not try to hook up the requirement of an "orchestrated campaign" to the language or policy of the equal protection clause, and we cannot think of any hook either. Nor is important that the oppression of the plaintiff was merely temporary. Many temporary deprivations are actionable even under provisions of the Constitution that, unlike the equal protection clause, require that the deprivation be of liberty or property. E.g., *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *In re Special March 1981 Grand Jury*, 753 F.2d 575, 580 (7th Cir. 1985). And to be deprived of water for three months is a potentially more serious deprivation than many permanent deprivations that we can think of.

Of course we are troubled, as was the district judge, by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case. But bear in mind that the "vindictive action" class of equal protection cases requires proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant. If the defendant would have taken the complained-of action anyway, even if it didn't have the animus, the animus would not condemn the action; a tincture of ill will does not invalidate governmental action. Maybe the present case can be disposed of on this or some other ground well short of trial; it cannot be disposed of on the pleadings.

And especially not on the defendants' alternative ground, that their action was not the cause of the plaintiff's lacking water for three months. They point out that had her well not broken down, which is not contended to be their fault, she would have had an uninterrupted supply of water no matter what the Village failed to do. This is a ridiculous argument. It is like saying that if she didn't live in the Village of Willowbrook she wouldn't (in all likelihood) have had a water problem. That is blaming the victim with a vengeance. Every injury has a multitude of antecedent conditions. When one of them is the defendant's culpable fault, he is not excused from liability on the ground that if some other, innocent condition hadn't been present (such as Columbus's discovery of America) no injury would have occurred. E.g., *Movitz v. First National Bank*, 148 F.3d 760, 762 (7th Cir. 1998); *United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir. 1995); *Milam v. State Farm Mutual Automobile Ins. Co.*, 972 F.2d 166, 169 (7th Cir. 1992).

REVERSED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: November 12, 1998

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JESSE E. ESCHBACH, Circuit Judge

No. 98-2235

GRACE OLECH,

Plaintiff-Appellant

v.

VILLAGE OF WILLOWBROOK an Illinois municipal corporation, GARY PRETZER, individually and as President of Village of Willowbrook and PHILIP J. MODAFF, individually and as Director of Public Services for Village of Willowbrook,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 97 C 4935, George M. Marovich, Judge

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

[Dated April 13, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRACE OLECH, Plaintiff, vs. VILLAGE OF WILLOWBROOK, et. al. Defendants.	)	No. 97 C 4935 Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

Plaintiff Grace Olech ("Olech") filed this action, pursuant to 42 U.S.C. § 1983, against Defendants the Village of Willowbrook ("Willowbrook" or the "Village"), Gary Pretzer ("Pretzer"), individually and as President of Willowbrook, and Philip Modaff ("Modaff"), individually and as Director of Public Services for Willowbrook, alleging that Defendants violated her rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss Olech's Complaint pursuant to Fed. R. Civ. P. 12(b) (6). For the reasons set forth below, the Defendants' motion to dismiss is granted.

BACKGROUND

Olech is the 72-year-old owner and resident of a single-family home on Tennessee Avenue in Willow-

brook, Illinois.[1] Olech's home is located between two other homes on Tennessee Avenue—owned by Rodney and Phillis Zimmer (the "Zimmers") on the south and Howard Brinkman ("Brinkman") on the north.

Up until the spring of 1995, Olech and her late-husband obtained their potable water from a private well located on their property. In the spring of 1995, however, the Olechs' well broke down and was allegedly beyond repair. Because the Willowbrook water main extended only to the northern boundary of Brinkman's property—the Olechs' neighbor to the north on Tennessee Avenue—in order to obtain water, the Olechs were forced to hook an overground rubber hose up to the well of the Zimmers—their neighbors to the south on Tennessee Avenue.

The Olechs apparently viewed this as a "temporary solution" to their water problem. As such, the Olechs, the Zimmers and Brinkman allegedly asked Willowbrook to hook their homes up "right away" to the Willowbrook municipal water system. Olech contends that she explained her water problems (the broken well) to Modaff, the Director of Public Services for Willowbrook, and notified him that the overground hose would not work in the winter when the temperature fell below freezing.

Olech contends that after alerting Willowbrook to her problem, the Village began work on extending the water main to hook up Olech's home and the homes of

---

[1] Since the time that the events at issue in this suit took place Olech's husband, Thaddeus Olech, has died of causes unrelated to this action.

her two neighbors. Willowbrook conditioned its work on an agreement by Olech and her neighbors to each pay one-third of the estimated cost of the project. By July 12, 1995, Willowbrook had received the required payments of $7,012.67 from Olech and her neighbors.

However, in August of 1995, Willowbrook informed Olech and her neighbors that in addition to their cash payments for the project, Willowbrook also required them to grant the Village a 33-foot easement along Tennessee Avenue. According to Olech, the Plat of Easement created by Willowbrook required property owners on both sides of Tennessee Avenue—the Olechs, Zimmers and Brinkman live on the west side of Tennessee Avenue—to dedicate a 33-foot strip of property along Tennessee Avenue for public roadway purposes. Specifically, Willowbrook wanted to install a paved roadway with sidewalks and public utilities on Tennessee Avenue.

The Olechs and their neighbors refused to grant Willowbrook the 33-foot easement that it required. As a result of the property owners' refusal to grant the easement, no progress was made on the water project. Finally on November 10, 1995, Willowbrook's attorney prepared a letter in which the Village withdrew its demand for a 33-foot easement and indicated to Olech and her neighbors that it would proceed with the water main extension if they would grant Willowbrook a 15-foot easement for the water main and the related water service line used to connect the homes. According to Olech's Complaint, the letter from Willowbrook's attorney stated, in part:

> [A] fifteen foot (15') easement, along with a temporary construction easement of five feet (5')

> on each side, will be sufficient to install the water main. This is consistent with Village policy regarding all other property in the Village.

(Compl. at ¶ 26.) Olech and her neighbors agreed to grant Willowbrook the 15-foot easement and the water project was completed approximately four months later on March 19, 1996.

Meanwhile, in November 1995, the overground hose used by the Olechs to connect to their neighbor's well froze. As a result, Olech and her husband were without running water from November 1995 through March 19, 1996.

Olech filed her Complaint with this Court alleging that Willowbrook violated her rights under the Equal Protection Clause by initially requiring that she and her neighbors grant the Village a 33-foot easement while only requiring a 15-foot easement from other Village residents.[2] Olech contends that the reason that she and her neighbors were singled out by Willowbrook was because they had each filed state-court lawsuits against the Village six years earlier in August of 1989.[3] Olech alleges that these lawsuits made Willowbrook and its officers and employees "look bad." Olech further alleges

---

[2] Olech bases this allegation on the letter she received from Willowbrook's attorney reporting that a 15-foot easement was "consistent with Village policy regarding all other property in the Village."

[3] The Olechs, the Zimmers and Brinkman filed three state-court suits against Willowbrook for damage that resulted from the flooding of their property by storm water. The Olechs and Zimmers were successful in their suits against Willowbrook. Brinkman's claims were dismissed for want of prosecution.

that these lawsuits generated "substantial ill will" on the part of Willowbrook and its officers and employees. This "ill will," according to Olech, is what ultimately motivated Willowbrook to require a larger easement (33 feet) from her and her neighbors than what is normally required (15 feet) from other property owners in the Village. Olech maintains that the three-month delay, which resulted from Willowbrook's request for the larger easement, is what ultimately caused her and her husband to be without running water during the winter of 1995-1996. Thus, it is this three-month delay that Olech claims deprived her of her rights under the Equal Protection Clause.

DISCUSSION

I. Standards For a Motion to Dismiss

When considering a motion to dismiss, the Court examines the sufficiency of the complaint, not the merits of the lawsuit. *See Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can prove no set of facts that would entitle him to relief. *See Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 432 (7th Cir. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiff's favor and assumes that all well-pleaded facts are true. *See Dimmig v. Wahl*, 983 F.2d 86, 86 (7th Cir. 1993).

II. Violation of the Equal Protection Clause

The Seventh Circuit has explained that there are two common varieties of equal protection claims: (1) those in which the plaintiff claims that she is a member of a vulnerable group (principally racial) and has been singled out for unequal treatment on that basis; and (2) those involving challenges to laws or rules that supposedly draw irrational distinctions. *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995). A third and more unusual claim involves "orchestrated campaigns of official harassment directed against [a plaintiff] out of sheer malice." *Id.* at 179. Olech contends that her Complaint belongs to this highly unusual class of equal protection claims.

In *Esmail,* a Naperville liquor dealer (Esmail) alleged that he was denied the renewal of his liquor license as a result of an "orchestrated campaign" by the mayor. Specifically, Esmail alleged that the mayor, who is also Naperville's liquor control commissioner, not only denied his repeated applications for a liquor license, but also instituted a "campaign of vengeance" against him which consisted of causing the Naperville police to harass him and his employees with "constant, intrusive surveillance, in causing the police to stop his car repeatedly and forc[ing] him to undergo field sobriety tests, and in causing false criminal charges to be lodged against him." *Id.* at 178. The court summarized that Esmail's "charge here is that a powerful public official picked on a person out of sheer vindictiveness." *Id.*

After reviewing Esmail's 22-page Complaint, the Seventh Circuit declared that:

> If the power of the government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court.

Id. at 179.

While this Court is sympathetic to alleged wrong suffered by Olech and her husband, the Court is not convinced that Olech's Complaint describes the "malignant animosity" or the "orchestrated campaign of official harassment" complained of in *Esmail.* Even accepting Olech's allegations that her state-court action generated "ill will" in Willowbrook against her and her neighbors, this Court is unable to conclude that the Village ever "harassed" or "picked on" Olech and her neighbors "out of sheer vindictiveness" as in *Esmail.* At most, Olech's Complaint alleges that the Village acted unreasonably and out of "ill will" in requiring her to give up an extra 18 feet of easement space that was not required of other property owners. This hardly qualifies as the same type of conduct alleged to have been suffered in *Esmail.* Moreover, based on the allegations contained in Olech's Complaint, it appears that the reason that the Village wanted 33 feet of easement rather than 15 feet of easement was so that it would be able to install a paved public roadway along Tennessee Avenue with sidewalks and public utilities—something it apparently could not do without the additional 18 feet of space. (Compl. at ¶ 25.) Nothing in Olech's Complaint—apart from conclusory assertions—indicates that Willowbrook was acting out of vindictiveness or in retaliation for Olech's prior lawsuit. *See Trask v. Rios,* 1995 WL 758410, at *5 (N.D. Ill. Dec. 19, 1995) ("'Harass,'

'discriminate,' and 'retaliate' are words to which legal significance attaches. Alone, they are legal conclusions that do not place defendants on notice of the circumstances from which the accusations arise and therefore are inappropriate pleading devices."); *Palda v. General Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995) ("A complaint [that] consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."). Assuming that all of the allegations contained in Olech's Complaint are true, it appears to this Court that there may be "ill will" on the part of both Willowbrook and Olech. Nevertheless, this Court finds that the alleged treatment of Olech by Willowbrook and its officers—as well as the alleged motivation behind this treatment—is not sufficient to state an equal-protection claim under the standards as set forth in *Esmail*.

CONCLUSION

For the foregoing reasons, this Court grants Defendants' motion to dismiss.

ENTER:

/s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT

DATE: /s/ April 13, 1998